

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of R. CURRY, Minor.

UNPUBLISHED

April 22, 2014

No. 318168

Tuscola Circuit Court

Family Division

LC No. 11-000154-NA

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Respondent father¹ appeals as of right from an order of the Family Division of the Tuscola Circuit Court terminating his parental rights to his minor child, RC, under MCL 712A.19b(3)(c)(i) and (ii) (conditions have not been rectified), (g) (fails to provide proper care and custody), and (j) (risk of harm if returned to parent's care). We affirm.

Petitioner filed a petition in regard to RC on June 7, 2011. The petition alleged domestic violence between the parents, use of alcohol and illegal drugs by both parents, and improper supervision of RC. On August 10, 2011, respondent entered a plea admitting or pleading no contest to portions of the petition. RC was placed in foster care. Respondent was referred to substance abuse and domestic violence counseling and parenting classes. Supervised visitation was ordered and the court ordered respondent to submit to random drug tests and "stay clean." By December 7, 2011, respondent had an apartment and the court ordered that unsupervised visitation could take place once RC had a room of his own in respondent's home. However, respondent missed several scheduled visitations leading up to a review hearing on March 27, 2012, and again missed a visit leading up to the first permanency planning hearing on June 7, 2012. It was reported at the permanency planning hearing that RC was "very confused as to what's going on in his life."

On July 25, 2012, respondent presented the trial court with a "care plan," and petitioner recommended more unsupervised visits. Then on December 6, 2012, the court ordered that overnight visits could begin. However, at the March 6, 2013 review hearing, petitioner reported that RC had been "struggling greatly" since the unsupervised visits had begun and was

¹ The child's mother was a respondent in the initial petition. She was killed in a car accident on July 25, 2011, after the petition was filed.

experiencing anxiety and sleep problems. Respondent had also missed several scheduled parenting times and counseling sessions. As a result, parenting time was again to be supervised. On March 16, 2012, respondent was pulled over by police, who found several marijuana cigarettes in the car. Respondent was charged with possession of marijuana and driving without a license. He pleaded guilty to an unspecified felony. A petition to terminate respondent's parental rights was filed on June 10, 2013.

Diane Kukulis, a therapist who specialized in children's mental health and play therapy and who worked with RC throughout the case, testified respondent failed to show up for several appointments. She stated that RC showed signs of developmental delays and experienced trouble sleeping. Kukulis testified that RC was "very bright" but "had a great deal of anxiety." Kukulis testified that RC had made progress with his issues, but that his anxiety resurfaced when visiting time with respondent increased from one to two days each week. She stated that respondent did not seem to understand the problems RC was experiencing and did not acknowledge his role in traumatizing RC when he was a small child. DHS caseworker Rebecca Wilanski similarly testified, "From the last time I worked with [respondent] he is still not accepting responsibility. And I don't think he fully understands the extent of the issues that his son has."

DHS caseworker Kristopher Osborn testified that respondent had a "general lack of compliance" with drug screening. Osborn testified that respondent had "two positive tests for marijuana in May of 2013. And then he was just non-compliant in June." Osborn stated that this was a concern because "it would be an indicator . . . that he hasn't addressed his problem with substance abuse." Osborn indicated that respondent had tested positive for cocaine and amphetamine use. Respondent attributed the positive cocaine screen to being exposed to cocaine dust while cleaning a vacuum cleaner at the car wash, and asserted that the amphetamines had been prescribed. Osborn was asked his opinion as to how much time it would take before respondent could be reunited with RC, given the recent positive drug tests and the lack of compliance. Osborn stated, "At best I would say six months, but it would probably be closer to a year."

Foster care visitation coordinators Amanda Duncan and Lindsey Ruppall each testified that respondent was appropriate during visits they supervised. Ruppall stated that respondent was "one of the most affectionate parents I've ever worked with," and that respondent placed appropriate limits on RC's behavior.

Respondent testified that he was currently living in a five-bedroom home with his fiancée, her twin daughters, and his younger half-sister. Respondent stated that he and his fiancée run a "Yorkie and Pit Bull kennel" out of the home and that she is also employed as a home healthcare provider. Respondent testified that he was self-employed in a lawn care business and also currently enrolled in college. Respondent indicated that his relationship with his fiancée was stable and that their finances were sound.

Respondent testified that he had completed drug counseling, anger management/domestic violence classes, and parenting classes. He explained that he missed several drug screens during the past year because he relapsed at the time of his late mother's birthday. On cross-examination respondent stated that the last time he used marijuana was "at the end of May." Respondent

denied using marijuana after this time but also conceded that he did not call in to test throughout the month of July because he “knew it was going to be a dirty drop.” When confronted with posts to Facebook indicating that respondent had been partying and drinking alcohol during this case, respondent denied making any of the posts.

The court held that respondent’s drug use, which was a condition at the time of the initial adjudication, continues to exist and that there is “no reasonable likelihood that the condition will be rectified in a reasonable time given the child’s age.” The court held that respondent is “putting his head in the sand” with respect to RC’s emotional issues and demonstrating a “lack of proper care and attention to the child.” “[G]iven the time that has elapsed,” the court stated, “there is no reasonable likelihood that father will be able to provide this child with the proper care.” The court then held that termination was in RC’s best interests.

Respondent argues that the trial court erred in finding clear and convincing evidence that statutory grounds for termination existed and that termination of his rights was in RC’s best interests. This Court reviews for clear error a trial court’s finding that a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). This Court also reviews the trial court’s finding that termination was in the best interests of the children for clear error. *In re Trejo*, 462 Mich 341, 364; 612 NW2d 407 (2000). “A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *In re BZ*, 264 Mich App at 296-297. The court must also find that termination is in the best interests of the child. MCL 712A.19b(5).

MCL 712A.19b(3)(c)(i) states that parental rights can be terminated where:

The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds [that] . . . [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.

Here, one of the conditions in the initial petition that brought RC under the jurisdiction of the court was substance abuse by both parents. Despite being offered and taking advantage of drug counseling and treatment, respondent admitted to using marijuana as recently as May 2013. At that point the case had been open for almost two years. He also acknowledged that he knew he would test “dirty” in July. Respondent denied it, but Osborn stated that his drug screens revealed cocaine and amphetamine use. Respondent did have more clean screens than dirty, but he also missed screens and, according to Osborn, was non-compliant. Further, respondent’s housing and employment continued to be concerns throughout the case. Even though at the time of trial he testified to having a stable housing situation, he had only moved in with his fiancée in the last three months. He stated the relationship was stable, but there was no evidence of long-term stability. Respondent’s employment situation was likewise uncertain.

It was not clear error for the trial court to find clear and convincing evidence that “[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that

the conditions will be rectified within a reasonable time considering the child's age." MCL 712A.19b(3)(c)(i).

None of the parties' briefs on appeal specifically address subsection (c)(ii), although it was cited by the trial court. MCL 712A.19b(c)(ii) provides termination of parental rights can be ordered where

[o]ther conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

This subsection was included in the petition, but the trial court's opinion did not separately address it. The trial court focused its analysis on respondent's continued drug use. Drug use by both parents was a concern in the initial petition that brought the child into the court's jurisdiction, so it was properly addressed under MCL 712A.19b(c)(i). The record does not contain evidence of any "other conditions" that arose after the initial adjudication that would have required the court to give respondent notice and a hearing. To the extent the trial court found that grounds for termination existed under (c)(ii), it was clear error. However, this error does not affect the outcome of this case because the trial court only needs to find clear and convincing evidence that one statutory ground exists.

Under MCL 712A.19b(3)(g), the court may terminate parental rights if it finds with clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." Respondent cites to *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), for the proposition that compliance with the parent agency agreement negates this statutory basis for termination. However, *In re JK* did not hold that compliance alone is conclusive on this issue. The Court did state that the respondent's "compliance negated any statutory basis for termination," *id.*, but in the next paragraph the Court states that compliance "is evidence of her ability to provide proper care and custody." *Id.* In other words, it is not simply a matter of attending to the schedules and outlines in provided services; it is a matter of incorporating changes into one's life.

Here, the facts show that respondent was not in compliance with his treatment plan. Most glaring is that respondent in this case has not remained drug free. There was testimony that respondent was appropriate, loving, and affectionate with RC. There was also testimony that respondent did not seem to appreciate RC's problems and accept his own responsibility for causing RC harm. There is evidence that respondent has gone through parenting classes, counseling, and worked hard through difficult circumstances to make time for his son. However, the evidence also shows that RC's interactions with respondent were little more than play dates and never progressed beyond that. When longer unsupervised visits were attempted, petitioner noticed such a change in RC that it was recommended that visitation once again be supervised. Clear error has not been shown with respect to MCL 712A.19b(3)(g).

Under MCL 712A.19b(3)(j), a court can terminate parental rights if it finds clear and convincing evidence that “[t]here is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.” Here there is no direct evidence to suggest that RC would be physically harmed if returned to respondent. The issue of neglect raised in the initial petition took place when RC was in his mother’s custody.

The arguments of all parties focus on the question of whether RC would be emotionally harmed if returned to respondent. Respondent argues that there is no evidence that RC would be emotionally harmed by being returned to him. Petitioner argues that respondent does not appreciate RC’s emotional injuries and will not be able to provide a supportive environment for him. Respondent argues that RC is going to have emotional issues regardless of whether he remains in foster care or is placed with respondent. There was testimony that respondent was appropriate with RC. There was also testimony that when petitioner increased unsupervised visits, RC had a negative reaction. The drug use is also a very real concern. Although a close question, the record does not establish the existence of clear error.

Regarding RC’s best interests, the court reasoned as follows:

[RC] has been in his current placement for almost one-half of his life. If the father were allowed to reunify with this child, an additional 6 months to one year will pass. The child would then have spent more than one-half of his life with the [foster] family, only to be uprooted and placed with his father. That would only happen IF father complied with and showed benefit from the services provided. Father has not been consistent throughout the case. Consistency is important for [RC]. . . . And, given father’s lack of compliance and lack of a showing of benefit, especially during this past six months, this court is not satisfied that father would change his ways for the long haul. [RC] deserves better. It is in the best interest of this child to have his father’s rights terminated.

The court’s reasoning is sound and supported by the record.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher